In the Supreme Court of the United States

OCTOBER TERM 1957

No. 951

PAUL S. HOWELLS, EXECUTOR OF THE ESTATE OF ADELE CANNON HOWELLS, DECEASED,

Petitioner,

vs

CHARLES FOX, DISTRICT DIRECTOR OF U. S. TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondent.

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled cause on December 19, 1957.

OPINIONS BELOW

The opinion of the District Court for the State of Utah, Central Division, is unreported, but set forth at pages 8 to 14 in the Appendix hereof. Judgment was entered on April 16, 1957.

The opinion of the Court of Appeals for the Tenth Circuit is set forth at pages 15 to 21 in the Appendix hereof. Judgment was entered on December 19, 1957.

JURISDICTION

Petitioner invoked the provisions of 28 F.C.A., Sections 1340 and 1396 for jurisdiction in the Federal District Court for the State of Utah, Central Division, at the inception of this action.

On the 18th day of March, 1958, Mr. Justice Whittaker granted an extension of time within which to file Petition for Writ of Certiorari to May 8, 1958.

The Jurisdiction of this Court is invoked under the provisions of 28 F.C.A., 347.

QUESTIONS PRESENTED

1. Petitioner contends that under language of a Will which causes an immediate vesting of property in a testator's children, subject to divestiture to his wife "if she shall survive distribution of his estate," that an order of formal probate distribution, either authorizing the taking before property is taken, or an order confirming and authorizing a previous taking, is absolutely required before any rights in that property may be taken away from the children who owned it, and given to a widow with a mere contingent right to acquire it.

In this case, the Circuit Court, while agreeing that the property in question belonged to the children, represented by petitioner, it nevertheless said that the widow became the owner by a mere taking, not needing to obtain probate Court approval either before or after the appropriation.

Petitioner contends that appropriation is not synonymous with distribution, the term "distribution," in its formal sense, being the precise contingency prescribed by the testator for his widow to acquire any interest, as prescribed by the California Probate Code, Section 143, hereinafter set forth verbatim.

Petitioner claims that property thus wrongfully and improperly taken from the proper and legal owners constitutes a claim against the estate of the gratuitous taker of the property, that should result in a lower tax upon the estate of the deceased who appropriated the property during her lifetime.

2. Petitioner claims that an absolute and unconditional gift, of an exact and specific sum of money may not be made a percentage gift, only, at the instance of the Director of Internal Revenue, for the reason that to permit such action is to include in the gross estate of a deceased something validly given away during a deceased's lifetime causing property to be taxed as a part of a deceased's estate that had not belonged to deceased for as long as 13 years, thus taking property from the recipients of gifts without due process of law, and of course not authorized by any act of Congress.

STATUTES INVOLVED

The pertinent statute petitioner relies upon which prescribes exact conditions for the divestiture of property once vested is:

> California Probate Code, Section 143—"A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event. A testamentary disposition when vested, cannot be divested unless upon the occurrence of the PRECISE contingency prescribed by the testator for that purpose." (Emphasis supplied.)

STATEMENT OF THE CASE

Petitioner is the Executor of the Estate of Adele Cannon Howells, and was so appointed on the 8th day of June, 1951. He is a child of deceased, and in his representative capacity, represents his two sisters, the sole and only residuary legatees of Adele Cannon Howells.

During the lifetime of Adele Cannon Howells, she served as the Executrix of her deceased husband's estate, who died a resident of California on March 29, 1939.

Mrs. Howells served as Executrix of said estate from April 18, 1939, until her death on the 14th day of April, 1951.

Value of the estate of David P. Howells was computed for the purposes of Federal Estate Taxation and the sum so levied was paid to the Commissioner of Internal Revenue in the State of California during the lifetime of Adele Cannon Howells.

The language of David P. Howells' will bequeathed all of his property to his wife, provided she survived distribution of his estate. The opinions below agreed with petitioner that that language caused an immediate vesting of all of his property in his children, not in his widow.

During Adele Cannon Howells' lifetime, while she was functioning as Executrix, she appropriated the sum of $99,814.20 from assets of the David P. Howells Estate, without obtaining approval for the use of said funds from the California Probate Court, either before or after taking the funds.

Petitioner made payment of Federal Estate Taxes levied upon the assets of the Estate of Adele Cannon Howells, and filed a claim for refund of taxes paid upon $99,814.20, main-

taining that the taking of that amount of money by Mrs. Howells during her lifetime constituted a valid and enforceable claim against her estate for the purposes of Federal Estate Taxation, since the money never belonged to her.

The judgments rendered by the United States District Court for the State of Utah and the United States Court of Appeals for the Tenth Circuit both held that said sum of $99,814.20 properly belonged to the children of David P. Howells under the terms of his will, but that the mere taking of said funds by Mrs. Howells, while serving as Executrix, satisfied the terms of the David P. Howells Will that the property would belong to her if she survived distribution of it. Judgments of both Courts, in effect, ruled that distribution meant mere taking and that there is no requirement that such property be formally distributed through probate proceedings in the State of California. The Circuit Court relied heavily upon the case of In re Bennett's Estate (Calif), 90 P2d, 84, which held that an Executor should be given credit for payments made to proper persons, but refused to recognize that the Court in the Bennett case reached its conclusion upon the condition that that was so only if rights of third parties had not intervened. In this case there was intervention of right. The property always belonged to the children and to no one else, and upon Mrs. Howells' death, there was no one to obtain confirmation. Petitioner claims that Section 143 of the California Probate Code should control in the matter, which provides:

> Section 143—"A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event. A testamentary disposition when vested, cannot be divested unless upon the occurrence of the PRECISE contingency prescribed by the testator for that purpose." (Emphasis supplied.)

Petitioner contends that formal probate administration is the precise contingency required, not mere appropriation—an appropriation that has been strenuously resisted by everyone concerned except respondent.

The second cause of action involved refers to six written assignments that Adele Cannon Howells, deceased, made to her children during her lifetime of a total and exact principal sum of $79,800.00, which, with accrued interest, totaled $90,582.50 due to the children at the date of death of Adele Cannon Howells.

These assignments gave said sum certain to the children from a $230,000.00 note owned by Mrs. Howells, payable by a corporation called Howells Land & Livestock Company. At the date of death of Mrs. Howells, the District Director of Internal Revenue determined that the assets of Howells Land & Livestock Company were not sufficient to meet the entire remaining note obligation in full, though there were ample funds to pay the children the full sum of their entitlement.

The Director, therefore, for the purposes of Federal Estate Taxation, determined that Mrs. Howells' Estate had ownership, 13 years later, of 78.73% of the total assets of the said Company, allowing the children to claim as their own only 21.27% of said total assets.

Petitioner claims that there was an absolute gift of a sum certain in money made to the children, inter vivos, and not a percentage interest.

The judgments below affirmed respondents' findings, which results in the revoking of valid inter vivos gifts by the Bureau of Internal Revenue.

REASONS FOR GRANTING WRIT

The Circuit Court of Appeals failed and refused to recognize that California, by positive statutory provision and case law requires formal proceedings before title to property may pass to another once it has been vested. The Court, in effect, absolutely states that probate administration of Estates is not required in California if the Bureau of Internal Revenue chooses to say so, and the Bureau, unrestricted, may tax property in a deceased's estate that always did belong to others, in which deceased's estate had no interest whatever, and deceased, a mere contingent, non-taxable interest before death.

Also, the decision authorizing the Bureau of Internal Revenue to make a sum certain assignment a percentage assignment, at its will, is of vital importance to all taxpayers, particularly this one, and such question has never before been decided by a Federal Court, nor by any other Court that petitioner knows of.

CONCLUSION

It is respectfully submitted that this Petition should be granted to prevent the taxing of property in an estate that did not belong to the estate, nor to the deceased during life.

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APPENDIX

UNITED STATES FEDERAL DISTRICT COURT FOR THE STATE OF UTAH

MEMORANDUM DECISION

Christenson, District Judge

The will of David P. Howells, deceased husband of Adele Cannon Howells, was admitted to probate in the State of California in 1939. Adele Cannon Howells, the decedent in the present action, was appointed executrix and administered her husband's estate until her death in 1951. In 1952, a federal estate tax return was filed with the Collector of Internal Revenue showing for Adele Cannon Howells, deceased, a federal estate tax payable of something over $60,000.00. An audit and review of the estate tax return was made by the appropriate tax authorities. Based thereon, a deficiency was assessed by the Director of Internal Revenue, successor of the Collector, in the amount of $49,641.76. Payment of this deficiency having been made by plaintiff executor, this action was seasonably brought by plaintiff to recover the claimed overpayment with interest.

The detailed facts as they appear in the written stipulation filed herein and the supplemental statement agreed to by the parties in open court at the time set for trial of the remaining issues, (transcript filed), are incorporated herein by reference and will serve as findings of fact as further supplemented by the facts referred to in this opinion. Bradlee v. White, D.C. Mass., 1940, 31 F.Supp. 569, Fed. Rules Civ. Proc. rule 52(a). Two questions, each having various facets, are presented:

I. Did the withdrawal and use of funds by the executrix of her deceased husband's will without court order give rise upon her death to an enforceable claim on the part of other legatees against her estate, deductible for federal estate tax purposes; or, stated differently, did the will under which such executrix acted vest such other legatees with title to the funds of the estate, subject to undeveloped conditions subsequent, so that her withdrawals without court approval during the course of probate created an enforceable claim against her?

II. Did assignments by the decedent in her lifetime of a portion of a note owing to her by a corporation, the assets of which were insufficient to enable it to discharge the note in full, authorize a proportionately lower valuation of the decedent's retained interest for federal estate tax purposes?

I.

The last will and testament of David P. Howells, deceased, provided in part as follows:

"Third: I hereby give, devise and bequeath the whole of my property and estate, of whatsoever kind and character and wheresoever situated, of which I shall die seized and possessed, or to which I may be entitled at the time of my death, unto my beloved wife, Adele Cannon Howells, if she shall survive distribution of my estate, and if not, then to my children, Paul Howells, Frances Howells and Barbara Howells, in equal portions, share and share alike; or if either of them shall be be dead then the share of such deceased shall go to his or her issue, equally and by right of representation, or if there shall be no such issue, then the whole thereof to the survivor of them.

"Fourth: I hereby nominate, constitute and appoint my wife, Adele Cannon Howells, Executrix of this my Last Will and Testament, to serve without bond, and I hereby expressly authorize and empower my said Executrix, if she shall so elect, to continue and operate during the probate administration of my estate any business operation or enterprise in which I am interested at the time of my demise, all profits and losses therefrom belonging to and falling upon my estate and not upon my said Executrix personally; and I further expressly authorize and empower my said Executrix to sell, lease or mortgage the whole or any portion of my estate at either public or private sale, with or without notice, and without securing any previous order of court therefor, and upon such terms and conditions as to my said Executrix may seem best, subject, however, to confirmation of court as provided by law."

Plaintiff contends that these provisions immediately upon the death of David P. Howells vested title to the funds in his children, Paul Howells, Frances Howells and Barbara Howells, subject to administration and subject to divesting if Adele Cannon Howells survived their distribution. I am inclined to agree. Jameson's Estate, 1949, 93 Cal. App. 2d 35, 208 P.2d 54; In re Hampe's Estate, 1948, 85 Cal. App. 2d 557, 193 P.2d 133; In Grieve's Estate, 1945, Surrogate's Court, New York County, 54 N.Y. Supp. 426; Stein v. United States Nat. Bank of Portland, 1941, 165 Or. 518, 108 P.2d 1016; In re Campbell's Estate, 1938, 28 Cal. App. 2d 102, 82 P.2d 22; In re Clark's Estate, 1930, 103 Cal. App. 243, 284 P. 231; In re Cross' Estate, 1912, 163 Cal. 778, 127 P.70; California Probate Code, 141-143. On general problem of construction, see late annotation, "Will Proviso—Death of Beneficiary," 51 ALR 2d 205.

But from this it does not follow that the $99,814.20 spent

by Mrs. Howells from the assets of the estate for her own purposes without formal distribution to her gave rise to a claim deductible from her estate for federal estate tax purposes. To be deductible, it would have to represent not an unrealistic claim but an enforceable one. Taft v. Commissioner, 304 U.S. 351, 58 S. Ct. 890, 82 L.Ed. 1393, 116 ALR 346; Commissioner of Internal Revenue v. Moore, 10 Cir., 1931, 48 F.2d 526; Jacobs v. Commissioner of Internal Revenue, 8 Cir., 1929, 34 F.2d 233, cert. den. 280 U.S. 603, 50 S.Ct. 85, 74 L.Ed 647; 26 U.S.C.A. 812, (1939).

Plaintiff of necessity must rely upon the theory that in withdrawing this money without formal order of distribution from the probate court, Mrs. Howells in effect was guilty of conversion or embezzlement as a fiduciary, In re Reed's Estate, 1927, 37 Wyo. 107, 259 Pac 815. If this were the legal effect, plaintiff would also be correct in his position that the failure of the children to obtain approval of their claim from the probate court in the matter of her estate would not be fatal to recovery. Commissioner of Internal Revenue v. Strauss, 7 Cir., 1935, 77 F.2d 401; Buck v. Helvering, 9 Cir., 1934, 73 F.2d 760; Erickson v. Smyth et al., 1952, D.C.N.D. Cal. N.D., 108 F. Supp. 412, reversed on other grounds, 9th Cir., 1955, 221 F.2d 1. The trouble here is that the basis assumed seems contrary to the true meaning and substance of the transaction.

Plaintiff concedes that the will did not contemplate a decree of final distribution in the matter of her husband's estate as prerequisite to the vesting of any assets in Mrs. Howells. Orders for partial distribution were repeatedly entered in favor of Mrs. Howells during her lifetime, the probate court and all parties concerned obviously being of the view that whatever assets were actually distributed to Mrs. Howells during her lifetime would be hers under the will.

She was in complete control of the estate and whatever funds she might choose to have distributed to her were hers as a matter of right. No one claimed then, nor do they claim now, anything to the contrary. Had she chosen to ask for a decree distributing the funds which she used for herself, as she did for the purpose of distributing real estate to herself, there is no question but that such request would have been granted. She actually did distribute to herself during her lifetime as the party entitled thereto the $99,814.20 in question. She did not obtain a formal decree of distribution. Does this circumstance permit the construction of a legally enforceable claim in favor of the children? It no doubt was not considered that there was any legally enforceable claim against her; only against the Government after her death. As to the former, there appears sufficient reason in that view. See Rosenberg et al. v. Baum et al., 10 Cir., 1946, 153 F.2d 10. And the claim against the Government depends upon the validity and enforceability of the claim against her.

I believe that it would be contrary to the reasonable and practical construction of the will to now consider Mrs. Howells' lawful use of funds from the estate under the circumstances dependent upon a formal decree or order of distribution, whether final or partial. The testamentary provision in question no doubt was intended, among other things, in view of possible tax incidents, to avoid channeling through Mrs. Howells' estate funds and property which she would not desire nor need in the event of her death before the closing of her husband's estate. I doubt that it was intended to operate as authority for the probate court to withhold from her funds or other estate property which she did desire to use; nor was it to permit her to enjoy the benefit of funds through actual appropriation and use and yet, through withholding request

for formal court approval, to preserve the tax benefits of non-distribution by empowering other legatees to lodge a technical claim against her estate if and when she might die prior to entry of a corresponding decree of distribution. At least, if this latter purpose did exist, it should not be implemented by the decision of this Court absent legal grounds in view of all of the circumstances of the case. I cannot find such grounds.

It is true that an executor acts at his peril in making advancements without court order, but he is protected if he pays the right persons their proper shares whether done with or without court sanction; and it has been held in California that it is mandatory on the probate court to credit the executor with the amounts so advanced under a decedent's will where no right of third parties have intervened. In re: Bennett's Estate, 1939, 13 Cal. 2d 354, 90 P.2d 84; See also Ford v. Commissioner of Internal Revenue, 6th Cir., 1931, 51 F.2d 206, cert. den. 284 U.S. 666, 52 S. Ct. 41, 76 L.Ed. 564; In re Stewart's Estate, 1934, 145 Or. 460, 28 P.2d 642; 34 CJS, "Executors and Administrators," 503, pp. 410-411.

Mrs. Howells was living when the money was actually distributed and used by her. Her failure to request a formal decree of distribution prior to her death should not be held to convert her conduct into a breach of fiduciary duty creating an enforceable claim against her estate for federal estate tax purposes.

II.

The second claim can be quickly disposed of. The assignees and the assignor were owners in common of undivided interests in the notes. The assignments in terms so provide, notwithstanding that they referred to specific sums of money. It was not legally justifiable for the interest in the notes re-

maining in Mrs. Howells at the time of her death to be valued on the theory that the assignees had acquired a guaranty of, or lien upon, the major portions of the corporate property. Mrs. Howells for gift tax purposes during her lifetime represented that both the assigned and retained interests should be deemed to have proportional claim to the assets. The same theory was properly applied by the tax authorities in evaluating the retained interest in the note for estate tax purposes. There is a presumption that this valuation was correct. Buck v. Helvering, supra. The stipulated facts confirm this presumption.

The clerk is directed to enter judgment in favor of the defendant dismissing plaintiff's complaint on the merits.

Dated this 15th day of April, 1957.

A. Sherman Christenson
United States District Judge

Filed April 16, 1957.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term, 1957

PAUL S. HOWELLS, Executor of the Estate of ADELE CANNON HOWELLS, deceased,

Appellant,

vs.

CHARLES FOX, District Director of U. S. TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE,

Appellee.

Number 5672

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

George E. Bridwell for Appellant:

Melvin L. Lebow (Charles K. Rice, Ass't Attorney General, Lee A. Jackson, Melva Graney, Louise Foster, Attorneys, Dept. of Justice, and A. Pratt Kesler, United States Attorney, were with him on the brief) for Appellee.

Before HUXMAN, MURRAH and BREITENSTEIN, United States Circuit Judges.

HUXMAN, Circuit Judge.

This case involves the validity of a deficiency estate tax assessment against the estate of Adele Cannon Howells in the amount of $49,641.76.

The facts are simple and not in dispute. The will of David

P. Howells, deceased husband of Adele Cannon Howells, was admitted to probate in the State of California in 1939. Adele was appointed executrix of the estate and administered it as such until her death in 1951. After her death, her estate was probated. The probate proceedings of her estate showed an estate tax liability of $60,338.74, an audit and review of the tax return was made and based thereon an additional tax of $49,641.76 was assessed. Paul S. Howells, executor of her estate, paid this additional tax under protest and then instituted this action to recover $41,132.13 of the same. He has appealed from a judgment of the Court in favor of the defendant and dismissing the complaint for failure to state a cause of action.

The controversy centers around the sum of $99,814.20, which Adele, an executrix of her husband's estate, paid to herself as beneficiary under the will. It is asserted that since she paid this sum to herself, without first securing the approval of the probate court, it constituted an unlawful distribution of her husband's estate for which she is liable. The contention is that this constitutes a debt against her estate which must be deducted from the gross amount thereof in arriving at the amount of the estate tax due from her estate.

The $99,814.20 which as executrix of her deceased husband's estate she distributed to herself was distributed under the third paragraph of Howells' will, which read as follows:

> "Third: I hereby give, devise and bequeath the whole of my property and estate, . . . unto my beloved wife, Adele Cannon Howells, if she shall survive distribution of my estate, if not, then to my children . . . in equal proportions, . . . "

For the purpose of this opinion, it may be conceded, as contended for by appellant, that immediately upon the death

of Howells, title to his property vested in his children, and all that Adele had was an expectancy, so to speak, or the right to receive the property if she survived distribution of the estate. But the question is, what was meant by distribution? We are in accord with the conclusion of the trial court in a memorandum opinion that the will did not contemplate a final distribution as a prerequisite to the vesting of any assets in Adele. We further agree that the court's statement that "Plaintiff concedes that the will did not contemplate a decree of final distribution in the matter of her husband's estate as prerequisite to the vesting of any assets in Mrs. Howells." We think this statement finds support in the record. During her administration of the estate, she made the following distribution to herself: Property located in Wyoming, 746 shares of Utah-Idaho Sugar Company stock; 2,500 shares Amalgamated Sugar Company stock; and a one-half interest in 5,000 shares of Wilshire Boulevard Center, Inc., stock. All these distributions were made upon orders of approval by the court, with the exception of the Utah-Idaho Sugar Company stock. This stock was assigned by her without first securing the approval of the court, although after the assignment a court order of approval was secured. None of these transfers are challenged by appellant. Throughout their brief they speak of formal approval of distribution. Thus they state in the brief, "Here there was no formal distribution."

The precise question then is, was the transfer of the sum of $99,914.20 void because she did not first obtain an order of approval from the Court? We think not. Since the question concerns California law, only cases of that state will be considered. Appellant relies on a line of cases such as In re Jameson's Estate (Calif), 208 P.2d 54; In re Clarke's Estate (Calif), 284 Pac. 231; and In re Hampe's Estate (Calif), 193

P.2d 155. None of these cases involved the precise question we have here. In the Jameson case the court considered an order for partial distribution of income from a life estate and, while the court talks about conditions precedent for the vesting of title, all the court really held was that the order for the distribution of this income was erroneous and void, because the income was within the control of the administrator, CTA, during the period of administration, subject to the payment of debts and other charges against the estate and was in fact needed to pay expenses and costs of administration. Neither the Clarke case nor the Hampe case involved the validity of partial distributions. In the Clarke case the will bequeathed legacies "to be distributed in the due course of the settlement" of the estate. All the court held was that for the legatees to take they must be alive at the time the estate was distributed. That was also the decision in the Hampe case. That will contained a provision, providing that in event that Martha Ahnden should die prior to distribution all interest in the properties bequeathed to her shall fail. There had been a partial distribution to her during the probation of the estate in the sum of $7,000.00. Thereafter, she died before the estate was closed and her heirs sought to obtain the balance of the legacy. All the court held was that since she did not survive the decree of distribution her legacy to the balance failed. The partial distribution of $7,000.00 was not involved in the case.

We think that the case that is decisive of the questions is In re: Bennett's Estate (Calif.), 90 P.2d 84. In that case the executor made a distribution to residuary legatees without first obtaining a court order. Thereafter, a creditor of the residuary legatees sought to garnishee these funds on the ground that the distribution being made without the approval of the court was illegal and void. The court in its opinion,

alluding to other cases on the question stated that " . . . the only reasonable construction to be placed upon these decisions is that it is mandatory on the probate court to credit the executor or administrator with the amounts thus advanced to legatees when no rights of third parties have intervened," and further held that the executor making payments to those entitled to them without first securing an order of approval from the court was protected.

Since Howells' will contemplated partial distributions during the period of administration, the executrix had a right to make such distributions to herself. Had Adele filed an application with the court for a distribution to herself of these funds, the court would have been required to approve it.

It had no discretion in the matter. Its action was solely ministerial. Failure to secure this approval in advance of the distribution affected no or :'s rights and the partial distributions were lawfully made by the executrix to herself as a legatee and her estate is not indebted to appellants because thereof. There being no debt due from her estate for these sums, it follows that they may not be taken as a deduction for the purpose of determining estate tax liability.

A second assignment of error relates to the value which was placed upon the interest Adele held in a note of $230,000 given by the Howells Livestock Company, Inc. The stock in this company was owned one-half by David P. Howells and the other half by his wife, Adele Cannon Howells. This note was issued to David P. Howells. During his lifetime he endorsed and delivered it to his wife. Thereafter, by assignment she gave each of her three children an interest in this note and in 1950 she gave each of them an additional interest in the same manner. The total amounts of these assignments

equalled $79,800.00 of the principal of the note. Mrs. Howells retained the remainder.

The assignments made by Mrs. Howells to her children are identical in substance and are as follows:

> "For value Received . . . Adele Cannon Howells hereby sells, assigns, transfers and delivers unto (the assignee) $20,600.00 of the principal of that certain promissory note . . . together with interest on said principal of $20,600.00 at the rate of seven (7%) percent per annum . . .
>
> "The undersigned Adele Cannon Howells hereby sells, transfers and delivers unto (the assignee) an undivided interest in said note to the extent of said $20,600.00 of the principal and interest on the same as above set forth, . . ."

The difficulty comes about because at the time of her death this note was not worth the face value thereof. It is appellant's contention that Mrs. Howells assigned to her three children the total sum of $79,800.00 and that this must be deducted from the appraised value of the note in determining the value of the interest retained by Adele.

We think the critical and determinative language of these assignments is "an undivided interest in said note" and that this evidenced the intent of the assignor that she and the assignees should hold this note in common and that their interest was that percentage stated in the assignment which it bore to the face value of the note. When Adele assigned an undivided interest to the extent of said $20,600.00, she in effect said that she assigned a percentage of that note which the $20,600.00 bore to the face value of the note. To us the terms of the assignments clearly indicate that each assignee was to receive an undivided interest in the whole of the note

in the portion of the stated sum to the face amount of the note. We do not think that by a consideration of the assignments in their entirety Adele intended to transfer a guaranteed sum of money which would be a lien upon the value of the note in derogation of the undivided interest which she retained in herself. Apparently this question has not arisen in California, because no cases have been cited and our search has failed to reveal any.

An examination of the entire record, the briefs and the able opinion of the trial judge lead us to the conclusion that the judgment is correct and it is, therefore, AFFIRMED.